

***United States Court of Appeals
for the Second Circuit***

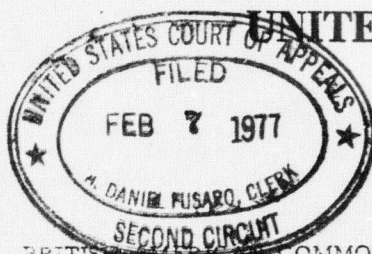


**APPELLANT'S
REPLY BRIEF**

77-6010/11

ORIGINAL
WITH PROOF
OF SERVICE

To be argued by
CHARLES J. HECHT
(20 minutes)



UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

BRITISH AMERICAN COMMODITY OPTIONS CORP. and LLOYD, CARR & CO.,
Plaintiffs-Appellants,

- against -

WILLIAM T. BAGLEY, Chairman of the COMMODITY FUTURES TRADING COMMISSION; JOHN V. RAINBOLT III, Vice Chairman of the COMMODITY FUTURES TRADING COMMISSION; READ P. DUNN, GARY SEEVERS and ROBERT L. MARTIN, Commissioners of the COMMODITY FUTURES TRADING COMMISSION,
Defendants-Appellees.

NATIONAL ASSOCIATION OF COMMODITY OPTION DEALERS, a non-profit association, BRISTOL OPTIONS, INC., CHARTERED SYSTEMS CORPORATION, BRITISH AMERICAN COMMODITY OPTIONS CORPORATION, CLEARY TRADING COMPANY, INC., FIRST NEW YORK COMMODITY OPTIONS, LTD., FIRST WESTERN COMMODITY OPTIONS, INC. OF LOS ANGELES, WILLISTON CORPORATION, LLOYD, CARR AND COMPANY and INTERNATIONAL COMMODITY OPTIONS, LTD.,
Plaintiffs-Appellants,

- against -

THE COMMODITY FUTURES TRADING COMMISSION, WILLIAM T. BAGLEY, Chairman COMMODITY FUTURES TRADING COMMISSION, JOHN B. RAINBOLT, II, Vice Chairman COMMODITY FUTURES TRADING COMMISSION, GARY SEEVERS, Commissioner COMMODITY FUTURES TRADING COMMISSION, READ P. DUNN, JR., Commissioner COMMODITY FUTURES TRADING COMMISSION and ROBERT L. MARTIN, Commissioner COMMODITY FUTURES TRADING COMMISSION,
Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFFS-APPELLANTS
BRITISH AMERICAN COMMODITY OPTIONS CORP. AND LLOYD, CARR & CO.

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PRELIMINARY STATEMENT

The defendants' ("CFTC") counter-statement of the case is a regurgitation of their prior briefs submitted to the District Court, adding several inconsistencies with prior statements previously made by them.¹ The use of a "Supplemental Appendix" as an addendum to a brief to highlight certain portions of the Joint Appendix or relevant statutes cited by an appellant is clearly improper practice.²

British American and Lloyd, Carr are confident that this Court will study Judge Knapp's opinion in detail including the brief transcript of the hearing on January 12, 1977 wherein he clarified his Memorandum and Order. Since such

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1. Rather than distract the Court from the real issues, set forth as a separate table appended hereto is an analysis of the major new inconsistencies in the CFTC's position before this Court.

The CFTC's counsel requested the name of our printer, which we promptly furnished, to make its own arrangements for extra copies and pick-up of the brief of British American and Lloyd, Carr. Service was made in accordance with the Federal Rules. When the undersigned was advised by the printer that they had not made any arrangements the master was delivered to my office where the CFTC's counsel was permitted, at no charge, to copy the brief. Such brief was copied on the morning of Thursday, January 27, 1977 and immediately "dexed" to Washington.

2. All of the items therein, with one exception, are set forth in the Joint Appendix which, in accordance with proper practice, sets forth the documents in chronological order with certain exceptions reflecting additional documents subsequently requested by the defendants and the NASCOD papers which were never part of the record in the Southern District of New York. Supplemental Appendix 19-47 was not included because counsel never requested its inclusion.

documents speak for themselves, the appellants herein deem it inappropriate to comment upon the CFTC's misrepresentations with respect thereto.

To place this appeal and the cross-appeal in proper perspective, set forth below are the four alternatives which the District Court was free to pursue with respect to the regulations in their entirety or any portion thereof.

1. Declare the regulations null and void pursuant to 5 U.S.C. §706(2)A et seq.;
2. Grant a preliminary injunction pending final determination, provided the District Court set forth the requisite findings of fact and conclusions of law as required by Rule 52(a);
3. Deny plaintiffs' request for a preliminary injunction provided the District Court set forth the requisite findings of fact and conclusions of law as required by Rule 52(a), and permit the case to proceed in the normal course; or
4. Deny plaintiffs' request for a preliminary injunction and grant defendants' motion for summary judgment provided the District Court set forth the requisite findings of fact and conclusions of law as required by Rule 52(a).

The District Court did not adopt the first alternative with respect to any portion of the regulations. Accordingly, the defendants' brief on Section 32.6 (D.Br. 32-51) ("double segregation") is misdirected and is irrelevant. The District Court adopted the second alternative in preliminarily enjoining the CFTC from implementing and enforcing Section 32.6 and in connection therewith made the appropriate findings of fact and conclusions of law as required by Rule 52(a). The District Court did not utilize the third alter-

native. The District Court adopted the fourth alternative in granting the CFTC's motion for summary judgment but also denied the plaintiffs' request for a preliminary injunction as to all of the regulations exclusive of Section 32.6 without making the requisite findings of fact and conclusions of law.

In their answering brief the defendants do not contest Point VII of plaintiffs' brief since a reading of Judge Knapp's opinion clearly shows that at the very minimum this case must be remanded to the District Court for appropriate findings of fact and conclusions of law in connection with denying plaintiffs' request for a preliminary injunction as to all of the sections of the regulations, exclusive of double segregation. As a result, this reply brief is directed toward the following issues: (i) whether the District Court properly enjoined the defendants from implementing or enforcing Section 32.6 of the regulations and (ii) whether or not the District Court and/or this Court should declare all of the regulations or any portion thereof null and void under 5 U.S.C. §706(2) and related statutory provisions.

SECTION 32.6 ("DOUBLE SEGREGATION")

- I. THE DISTRICT COURT PROPERLY HELD THAT SECTION 32.6 OF THE REGULATIONS MAY VIOLATE 5 U.S.C. §706(2)(A) AND, THUS, HAD AUTHORITY UNDER THE CIRCUMSTANCES TO GRANT A PRELIMINARY INJUNCTION

The District Court could have declared Section 32.6 invalid. Since it is arbitrary, unreasonable and punitive

and has no relation to the method of business of the plaintiffs or protection of their customers' equity, it obviously violates 5 U.S.C. § 706(2)(A). It chose rather to preliminarily enjoin the implementation thereof pending a hearing on the merits.

In inveighing against the decision of the District Court the CFTC (i) adverts to the Congressional debates leading to the adoption of the original Commodity Exchange Act all of which deal with margin accounts and the extension of credit by the dealer to customers and are therefore inapposite to the operations of commodity option dealers such as British American and Lloyd, Carr who do not sell on margin or hold customers' funds; (ii) adverts to the problems of the J.S. Love and Goldstein, Samuelson situations,³ both of which involved fraud abuses, as to which the CFTC has almost since its inception been possessed of a broad and pervasive anti-fraud statute, in connection with the sale of "naked" options, a form of bucket shop operation, in which concededly neither of the plaintiffs is engaged; (iii) alludes to the possible difficulty of tracing customer accounts through the estate of a bankrupt dealer, whilst trying to save face by halfheartedly conceding the proper solution for customer protection, as distinguished from fraud, is appropriate recordkeeping procedures.⁴ The CFTC, in its attempt to justify segregation, further engages in

3. The Goldstein, Samuelson situation, the primary motivation to the 1974 amendments to the Commodity Exchange Act (the "Act") involved the writing of "naked options", and thus is irrelevant (521).

the use of the "big lie" technique in attempting to dismiss plaintiffs' evidentiary data showing that "double segregation" as well as certain other portions of the regulations, have no rational relationship to plaintiffs' method of operations or protecting the customers' equity in their investment in the hope of concealing their failure to introduce any evidentiary material whatsoever. Throughout this proceeding, including this appeal, the defendants have raised the spectre of "fraud" to justify various provisions of their new regulations including double segregation. In fact, not only have British American and Lloyd, Carr been subject to a pervasive anti-fraud regulatory scheme, but so have the other affected parties since the very day they began operations, and "fraud" is totally unrelated to the purported need for "double segregation."

Lost in this smokescreen and almost denied by the CFTC is the practical and very real difference between an option dealer who acts as agent and does not extend credit and the purveyors of futures contracts who extend credit to their customers. As to the latter, there is justification for forcing them to segregate the customers' assets which are pledged as collateral or security for the extension of credit.⁵ On the other hand, the CFTC is asking option

4. They are well aware that customers have purchased options from one dealer and exercised that option through another dealer.

dealers who concededly do not extend credit to hypothecate the customers' funds as collateral for a loan extended to them so that they can justify the "double segregation" requirements. This nonsensical approach was categorically rejected by Judge Knapp during oral argument on December 10 (Tr. of December 10, 1976 at p. 69). Their latest rejoinder is that presumably an option dealer can assign as collateral its own contingent remainder interest in the customers' funds (D.Br. 47).⁶ Not only is this suggestion first enunciated in their brief on appeal absurd, it violates one of the Ten Commandments, "Thou shall not steal." The defendants have never recognized the basic issue or their regulatory function--how do you protect all of the customers' equity consistent with the method of operations of retail commodity option dealers? Double segregation, which was obviously designed to give the large existing securities broker-dealers an oligopoly,⁷ is clearly not the answer.

-
5. Query, why is their minimum capital requirement only \$10,000 (see Main Brief pp. 42-44).
 6. Reference is made to the subsequent discussion and the minimum financial requirements which requirements specifically state that customer funds are not to be considered assets of the dealer.
 7. The CFTC concedes that "double segregation" will result in substantially higher costs to the customer, even assuming that financing is available, as to which the CFTC submitted no evidence, and which has previously been shown, and found by the District Court to be, unrealistic (524).

SECTION 32.3 ("REGISTRATION")

II. THE DISTRICT COURT ERRED IN NOT VOIDING
OR ENJOINING THE DEFENDANTS FROM IMPLE-
MENTING §32.3 OF THE REGULATIONS (THE
"REGISTRATION" PROVISIONS)

While conceding that British American and Lloyd, Carr have raised valid constitutional questions with regard to the registration provisions, the CFTC's offhand rebuttal is that the registration provisions alone are at issue and plaintiffs are not entitled to question, and this Court is not entitled to review the susceptibility of the regulations to arbitrary application (D. Br. 76). In short, armed with a regulation which contains no meaningful constraints and a cut-off date for registration, as distinguished from filing, the CFTC is in a position to put any company or individual immediately out of business. A classic case is plaintiff Lloyd, Carr. First, the CFTC represented to this Court that Lloyd, Carr never filed an application as an FCM (651). Then, when Lloyd, Carr produced a time-stamped receipt of its application and a cancelled check (704-708), the CFTC then said the application was filed but "returned" with a letter of comment, which alleged comment letter Lloyd, Carr never received. The CFTC represented to this Court that the applications of companies such as Lloyd, Carr would be expeditiously processed, which representations were presumably the basis upon which plaintiffs' request for a stay pending the appeal was

denied. The CFTC is well aware that their conduct subsequent to January 17, 1977 is to the contrary as they have arbitrarily used the January 17, 1977 registration cut-off date as a lever to create havoc in the industry.

The only significant additional requirement for a CTA to register as an FCM is compliance with Reg. 1.17, the minimum financial requirements. Lloyd, Carr was audited for three days and was advised by the CFTC that it met the minimum financial requirements. However, as retaliation for participating and financing this litigation, the CFTC's Division of Enforcement would not permit Lloyd, Carr's FCM application to be processed and ordered it to cease all operations under Section 32.3 until they could storm in to the premises of Lloyd, Carr without any limitations or probable cause.⁸ On February 3, 1977 the defendant filed an Administrative Complaint and Notice of Hearing⁹ against Lloyd, Carr taking the position that since Lloyd, Carr is not yet registered as an FCM because it refused to accede to the staff's orders it is violating the Act. Accordingly, the defendant's position (D. Br. 76) that this Court is only entitled to review Section 32.3 in the abstract, and cannot review the unfettered ability of the CFTC to apply in an arbitrary and capricious manner those very rules, which concededly contain no due process restraints, is a mockery of justice and an affront to the dignity of this Court.

8. The Division of Enforcement admitted that there were no customer complaints. They were offered the right to
(cont. on next page)

As to British American, the CFTC by administrative fiat is attempting to overrule an order of a judge of the Southern District of New York in CFTC v. British American Commodity Options Corp., CCH Fed.Comm.Fut.L.Rep. ¶20,198 (S.D.N.Y. 1976) which order the CFTC has appealed.¹⁰ The CFTC's attempt to oust this Court of jurisdiction should not be countenanced.

Based on the foregoing, this Court, at the very minimum, should enjoin the defendants from implementing or enforcing Section 32.3 of the regulations as to Lloyd, Carr and British American.

(cont. from previous page)

pick 15 customers at random and a review of all of applicant's marketing literature to ascertain whether Lloyd, Carr was in any way defrauding its customers. This offer was refused. In view of the expedited briefing schedule, if the Court so directs, affidavits will be furnished setting forth the complete details of this series of events.

9. There are no fraud allegations in such complaint.
10. The CFTC waited until the last day (i.e., after the regulations were published) to file their appeal which has not been expeditiously processed. The undersigned now realizes that this was deliberate because the theory of that appeal is that federal judges are merely rubber stamps for agency action. The appeal is patently without merit but serves the purpose of permitting the CFTC to take the position, albeit improperly, that Judge Gagliardi's opinion is not determinative and, thus, British American must cease all operations even though it has been held that this is contrary to the public interest.

REGULATION 1.17 (MINIMUM FINANCIAL REQUIREMENTS)
and
SECTION 32.5 (DISCLOSURE)

III. THE DISTRICT COURT ERRED IN NOT DECLARING NULL AND VOID REG. 1.17 OF THE GENERAL RULES AND SECTION 32.5 (DISCLOSURE) OF THE REGULATIONS AS VIOLATING 5 U.S.C. §706(2) AND (B)

A. Minimum Financial Requirements

As they did in the District Court, the CFTC would have this Court rely on the unsupported contentions of counsel which have heretofore been shown to be contrary to the actions of the CFTC staff and provisions of various rules and regulations promulgated by them.

Thus, at page 73 of their brief, the CFTC states that funds segregated under Section 32.6 can be included in computing net capital. In point of fact, Reg. 1.17(2)(xii) specifically excludes from current assets "cash and claims to cash which are restricted as to withdrawal" and accordingly segregated funds are clearly excluded from net capital computations. It is this type of confused thinking which has understandably created "chaos in the industry."¹¹

In addition, the provision for \$50,000 minimum capital for an option dealer who acts only as an agent, while a futures contract dealer who extends customer credit is only

11. Reference is made to the prior discussion of the defendants' new contention that the segregated funds may be used by the option dealer as collateral for the financing required to effectuate double segregation.

required to have a minimum capital of \$10,000, has no basis in fact or reason. This is further discussed below under the failure of the CFTC to adopt "the least anti-competitive means."

B. The CFTC Has Failed to Take the Most Anti-Competitive Means

7 U.S.C. §19 provides:

"The Commission shall take into consideration the public interests to be protected by the anti-trust laws and endeavor to take the least anti-competitive means of achieving the objectives of this chapter . . . in issuing any order or adopting any Commission rules or regulation . . ."
(emphasis supplied)

In spite of this clear Congressional mandate, the CFTC has failed to take the least anti-competitive means in promulgating the disclosure provisions of Section 32.5 and the minimum financial requirements of Reg. 1.17.

Simply stated, assuming the disclosure requirements to be necessary in the public interest, there is no sound reason given by the CFTC as to why similar requirements are not imposed upon purveyors of futures contracts which are admittedly more speculative and subject to more risk. Likewise, there is no sound reason given as to why a purveyor of futures contracts should have less capital than an options dealer. Not only would it be less anti-competitive, but it would be more protective of the public if similar provisions were applicable to futures contracts dealers as well as

options dealers.¹² Failing to comply with 7 U.S.C. §19, Section 32.5 and Reg. 1.17 should be held null and void.

The decisional law cited by the CFTC is inapposite since the cases referred to deal with public carrier mergers or operations under the Securities and Exchange Act of 1934, as amended. In those statutes Congress did not specifically enact an anti-competitive edict similar to 7 U.S.C. §19.

IV. THE DISTRICT COURT ERRED IN NOT VOIDING
THE REGULATIONS FOR FAILURE TO COMPLY
WITH 5 U.S.C. §§ 553 and 706(2)(D) AND
IN GRANTING SUMMARY JUDGEMENT ON THIS
ISSUE TO THE DEFENDANTS

In their lengthy discussion of the procedures followed by them in promulgating the rules and regulations as published in the Federal Register on November 24, 1976, the CFTC finally admits that the proposals published February 20, 1976 "embodied a substantially different approach to the regulation of commodity option transactions than the approach ultimately adopted . . ." and that "it was not found necessary to include provisions for the segregation of customers' funds or the delivery of a disclosure statement to prospective option purchasers." (D. Br. 21) Since substantially all of the testimony and public comments received

12. This is the logical and inevitable result of permitting one segment of the industry to draft the regulations for another aspect of the industry which is directly competitive. The CFTC has yet to show any authority for the delegation of its responsibilities to the "Advisory Committee."

by the CFTC were with respect to the February 20, 1976 proposals and not the regulations as first published October 8, 1976, it is clear that there was no meaningful opportunity for interested persons "to participate in the rule-making" and thus the District Court erred in finding that there was adequate notice and opportunity for comment (515-516).

Furthermore, the defendants' position that the courts are required to accept without question the statements of government agencies supporting "good cause shown" is clearly untenable. No one, including the CFTC, is above the law. At the very minimum the District Court should have examined the truth and relevance of these statements in light of the record before it, for if it had, it could, and we contend would, have found that the defendants violated 5 U.S.C. §§553(d) and 706(2)(D) as well as the Congressional mandate to the defendants set forth in 7 U.S.C. §6c(b).¹³

Their contention set forth in footnote 73 (D. Br. 62) that since the 30 days has now expired the issue is moot and, thus, this Court is powerless to review their "good

13. The cases cited on page 64 of their brief clearly do not stand for the proposition that the courts are prohibited from reviewing an agency's statements of good cause shown and in fact show that in those cases the courts carefully analyzed the factual and legal basis for the government's claims and need for an exemption from the 30 day notice requirements. Their statement (D. Br. 63) that these scheduled oral hearings would only relate to the second stage of the regulations is contrary to this "timetable" (491) and their statements in the news media.

cause shown" statements is just another example of their contempt for the courts and fundamental due process and fairness.

V. THE DISTRICT COURT ERRED (A) IN FAILING
TO PRELIMINARILY ENJOIN THE IMPLEMENTATION
AND ENFORCEMENT OF §§1.17, 32.3 AND 32.5
AND (B) IN GRANTING, IN PART, DEFENDANTS'
SUMMARY JUDGMENT

The defendants do not dispute the fact that the District Court failed to make the requisite findings of fact and conclusions of law in denying plaintiffs' request for a preliminary injunction as to the other sections of the regulations, exclusive of Section 32.6. As a result, exclusive of the ruling as to Section 32.6 as to which Rule 52(a) was complied with, this case must be remanded to the District Court.

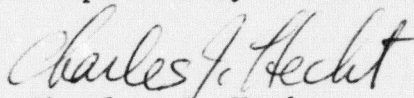
CONCLUSION

On the basis of the foregoing, British American and Lloyd, Carr respectfully request that:

1. The Court affirm in all respects that portion of the order dated January 3, 1977 which granted a preliminary injunction with respect to the implementation and enforcement of Section 32.6 of the regulations.
2. The Court reverse in all respects that portion of said order which granted defendants' motion for summary judgment.

3. The Court grant such other and further relief as may seem just and proper under the circumstances.

Respectfully submitted,



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ADDENDUM

MAJOR INCONSISTENCIES IN DEFENDANTS'
COUNTER-STATEMENT WITH PRIOR PUBLISHED
STATEMENTS UTILIZED BY THE DEFENDANTS
IN THE DISTRICT COURT*

- | | |
|---|---|
| 1. Pp. 10 and 11 - Commodity options are not subject to a comprehensive regulatory scheme. | 1. Prior hereto commodity option dealers registered as commodity trading advisors under 7 U.S.C. §6(n) and have been subject to the anti-fraud (301) and other provisions of the Act since October, 1975. |
| 2. Pp. 13-14 - Regulations needed because of fraudulent activity resulting from the writing of naked options. | 2. None of the plaintiffs herein are alleged to write naked options. |
| 3. Pp. 15 and 16 - Option regulations published after 19 months of extensive Commission study. | 3. Regulations published on October 3, 1976 as issued by November 24, 1976 regulations completely different from prior regulations (55-65), 40 Fed. Reg. 18187 (709) and the anti-fraud provisions of §§32.8 and 32.9 (301); also page 21 of defendants' brief herein. |
| 4. P. 25 - Implying that the Advisory Committee solicited and received numerous written comments from the public. | 4. No record of any open hearings or participation by outsiders in Advisory Committee activities or report. The hearings referred to in the one day of public hearings on March 8, 1976 related to the February 20, 1976 proposed rules, which CFTC now concedes at p. 21, is a completely different regulatory approach. |

* Excludes inconsistencies in their arguments (e.g., minimum financial requirements as discussed in the main brief at pp. 44-45).

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROBERT LA GRASSA, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 62-20 60' RD
MASTEETH, N.Y.

That on the 7 day of FEBRUARY, 1977,
deponent personally served the within REAL BRIEF OF PLAINTIFFS-
APPELLANTS BRITISH AMERICAN COMMODITY OPTIONS CORP. LLOYD CARR & CO.
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving true copies of same with a duly
authorized person at their designated office.

By depositing 2 true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

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Sworn to before me this

7 day of February, 1977 Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978